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IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES *EX REL.* JANET CHANDLER, Ph.D.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS, THE GRADY HEALTH SYSTEM, THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, THE MEMORIAL HEALTH CARE SYSTEM, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, AND THE RIVERSIDE COUNTY REGIONAL MEDICAL CENTER IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(a) of the Rules of this Court on written consent of all parties filed with the Clerk of this Court concurrently with this brief, the National Association of Public Hospitals and Health Systems ("NAPH"), the Grady Health System, the Health and Hospital Corporation of Marion County, the Memorial Health Care System, the New York City Health and Hospitals Corporation, the Public Health Trust of Miami-Dade County and Riverside County Regional Medical Center, respectfully submit this brief *amici curiae* in support of Petitioner seeking a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae consist of NAPH, a national association of safety net hospitals and health systems, and six of its members, all of which are owned or operated by local governments (*i.e.*, county or city hospital authority, hospital district or public benefit corporation). NAPH represents over 100 providers that deliver "safety net" health care services, predominantly in large metropolitan areas. The overwhelming majority of NAPH members are either governmentally owned or operated, or have significant long-standing ties to governmental entities. Thus, NAPH and its members have a significant interest in whether the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, may be applied to local governmental entities.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no person or entity other than *amici,* their members, or their counsel have made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

Public hospitals and health systems that are owned or operated by local governmental entities (hereinafter "local public hospitals") fill a critically important role in our society. These providers render a disproportionate share of inpatient and outpatient medical care in their communities to low income patients and otherwise vulnerable populations, typically persons who are Medicaid-eligible or without health insurance and many of whom suffer from chronic disease such as AIDS, asthma, tuberculosis and diabetes. In following their public mission, these providers serve as the primary "safety net" health care facilities in their communities.

To a large extent, private providers generally are unable or unwilling to guarantee access to care for all, regardless of ability to pay, in the same manner as local public hospitals. Market forces and the realities of health care economics simply do not permit such "generosity." Therefore, public hospitals fill the void left by this market failure, providing a public good – guaranteed access to care – that the free market cannot support. In illustration, NAPH members represent less than two percent of all hospitals in the United States, yet they provide almost 25 percent of all uncompensated hospital services across the nation. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *America's Safety Net Hospitals and Health Systems, 1999* (2001) at iv [hereinafter *America's Safety Net*].

Local public hospitals also play a vital role in serving their communities at large, not just the poor and uninsured. In this capacity, they provide high-level specialty services such as emergency and trauma care, burn care, emergency psychiatric care and neonatal intensive care to their surrounding communities – rich and poor alike. These specialty services are provided as part of the public hospital's mission, despite their high cost and extremely low reimbursement rates. Local public hospitals also are an integral part of this nation's front line response to

emergencies, including acts of bioterrorism. As other health care providers do not generally have all of these capabilities, local public hospitals must fill a unique niche in our communities.

Given their public mission, local public hospitals are extremely dependent on funding from federal, state and local governments. NAPH member data indicates that over half of the services provided by these hospitals are to individuals covered by either Medicare or Medicaid. *Id.* at 29. These hospitals rely on federal, state and local governments for over 70 percent of their patient revenues. *Id.* at iv. Significantly, the largest single source of financial support for NAPH member hospitals, at 39 percent, is state and local government subsidies for indigent care. *Id.* at 6. One consequence of receiving this governmental funding is that local public hospitals may be subject to a myriad of federal, state and local laws governing submission of claims for reimbursement, leading to the question at hand, whether these public hospitals are subject to the FCA.

Amici submit that the decision below, *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7th Cir. 2002), is inconsistent with prior holdings of this Court and conflicts with decisions of sister circuits in regard to the applicability of the FCA to local governments. Litigation arising out of the current ambiguous state of the law is consuming scarce funds of local public hospitals that would otherwise be dedicated to providing health care services to low income and uninsured populations. Further, if they are found liable, the imposition of punitive damages upon local public hospitals under the FCA threatens the ability of these providers to render essential, yet underreimbursed, health care services in their communities.

Therefore, *amici* have a significant interest in establishing that local public hospitals are not subject to the FCA.

SUMMARY OF THE ARGUMENT

Cook County, Illinois[2] has petitioned for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit based on the decision in *Chandler*, 277 F.3d 969, which squarely conflicts with other circuit courts of appeal regarding whether local governments may be liable under the FCA. Cook County also is requesting review by the Court because of the critical nature of the issue to tens of thousands of local governments and the manifest incorrect nature of the decision below. *Amici* agree with the arguments advanced in the Petition and strongly urge the Court to grant the petition for writ of certiorari.

The current confusion in the law among circuit courts regarding the application of the FCA to local governments, and the resulting costs to the public, are alone sufficient reasons for review by the Court. *Amici* file this brief to emphasize the nature of one class of local government services – safety net health care services provided by local public hospitals – that are at risk as a result of the decision below. Indeed, the absence of clear precedent is causing litigation at significant cost that further hampers the ability of local public hospitals to carry out their essential public mission of providing health care in our communities.

Aside from the urgent need to resolve this split among the circuits, the Court should grant certiorari in this case because it has already recognized the importance of governmental immunity from punitive damages. Imposing punitive damages upon a local governmental entity results in either an increased tax burden or a diminution of services

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[2] The relator initially sued both Cook County and Cook County Hospital. Because Cook County Hospital was found to have no identity independent of the county, the hospital was dismissed from this action. *See Chandler*, 277 F.3d 969; *see also United States ex rel. Chandler v. Hektoen Inst.*, 35 F. Supp. 2d 1078, 1086 (N.D. Ill. 1999).

for the individuals served by this entity. In the circumstance of local public hospitals, punitive damages could cause irreparable harm in the form of significantly reduced access to care for community members, often the poor and uninsured, who routinely turn to these facilities when they are sick or injured.

The application of the FCA to local governmental entities is particularly unwarranted because liability under the FCA mandates the imposition of punitive damages, without alternative. Moreover, an FCA action may be prosecuted by a private relator on behalf of the United States even when the United States has declined to intervene. Thus, a private relator, if successful, may reap a "windfall" at the expense of the public. If unsuccessful, the relator has imposed significant litigation costs that would have been better spent on the provision of public services.

Therefore, whether the FCA is applicable to local public hospitals is a question of vital importance to our communities at large. Application of punitive damages in this and similar cases imposes a hardship upon the public that far outweighs any deterrent effect. Imposition of such a societal burden also conflicts with this Court's previous holdings that the FCA is a punitive statute and that local governmental entities are immune from liability for punitive damages.

For these reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

ARGUMENT

Rule 10 of the Rules of this Court sets forth the considerations governing review of a petition for writ of certiorari. Certiorari is proper in this case because the Seventh Circuit's ruling has created a direct conflict among circuit courts. This conflict is the cause of significant litigation costs that impede the ability of local public

hospitals to fulfill their mission of rendering services to needy patient populations. Moreover, certiorari should be granted because the Seventh Circuit's decision, in departing from this Court's holdings, presents an issue of vital importance to this nation's local public hospitals and the patients they serve.

I. The Court Should Grant the Petition Because the Imposition of Punitive Damages Undermines Society's Interest in Meeting the Needs of Vulnerable Patient Populations and Taxpayers

This Court has clearly established that punitive damages should not be applied to local governments, *see City of Newport, et al. v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) and that the FCA is a punitive statute, *see Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 329 U.S. 765 (2000). These decisions make clear that punitive damages under the FCA extend beyond compensating the federal government for its losses, and instead seek to punish the wrongdoer. *Id.* at 786 (citation omitted). If applied to local public hospitals, punitive damages under the FCA would harm poor and uninsured individuals who rely on those facilities for their health care needs, in addition to the taxpayers and entire communities who benefit from the services of local public hospitals. Thus, certiorari should be granted to protect the public's interest in ensuring the viability of local public hospitals.

A. Punitive Damages May Not Be Applied to Local Governments

In the seminal case, *Newport*, 453 U.S. 247, this Court holds that local governments have absolute immunity from punitive damages under the Civil Rights Act, 42 U.S.C. § 1983. Although *Newport* arose out of alleged civil rights violations, its reasoning may be equally applied in the context of FCA claims. In particular, this Court's recognition and application of the historical presumption

against the imposition of punitive damages upon local governments, as well as its understanding of the public policy interest served by this immunity, leads inevitably to the conclusion that Congress intended that local governmental entities, such as public hospitals, be exempt from the FCA.

In *Newport*, this Court explores the history of judicial application of punitive damages in the mid-1800s – a time contemporaneous to the period in which the FCA was first enacted – and concludes that "the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Id.* at 260. In explaining the common law tradition of protecting local governments from liability for punitive damages, this Court states:

> Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those [punitive damages] which the plaintiff has recovered … cannot, in our opinion, be sanctioned by this court, *as they are to be borne by widows, orphans, aged men and women and strangers,* who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.

Id. at 261 (quoting *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)) (emphasis added).

In *Newport*, this Court determines that punitive damages do not compensate the injured party, but instead are intended to punish the wrongdoer and deter similar actions in the future. *Id.* at 266-67. Indeed, the cost

associated with such punitive damages "may be very real," "imposing strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-71. "Neither reason nor justice" supports imposing such punishment on the innocent taxpayers of a local government, who would bear the burden of punitive damages through reduced services or higher taxes. *Id.* at 267.

This Court's reasoning in *Newport* is as applicable to the FCA as to 42 U.S.C. § 1983 because the FCA imposes punitive damages. Thus, imposing FCA damages upon local governments would contradict the Court's holding in *Newport*. Because the FCA *mandates* treble damages, it is by its construction, an inappropriate punishment of local governments, resulting in detrimental harm to the public. In contrast, when the application of punitive damages is *discretionary*, the court or fact finder may look to common law principles to weigh such factors and determine whether punitive damages are indeed appropriate. Such factors may include: 1) whether the award was excessive or inadequate, 2) the degree of reprehensibility of the defendant's conduct, 3) the financial position of the defendant, and 4) the cost of litigation. *See Pacific Mutual Life Insur. Co. v. Haslip, et al.*, 499 U.S. 1, 21 (1991). This process allows for the necessary balancing of the benefit to the plaintiff and the need for deterrence against the cost imposed upon the blameless, which in the case of local public hospitals, are the taxpayers, vulnerable patient populations and communities at large. The FCA provides no such opportunity to consider the equities of each case in awarding punitive damages. This absence of alternatives provides more reason why absent clear congressional intent, immunity should be applied to local governments under the FCA.

The Seventh Circuit's opinion below ignores the Court's application of a common law presumption against

imposing punitive damages upon local governments, as well as policy considerations that strongly support this presumption. In subjecting Cook County to potential FCA liability, the court below also disregards the cost to the taxpayers, as well as to the community served by Cook County. In illustration, the court held:

> Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit.

Chandler, 277 F.3d at 978. The court's faulty logic undermines its own argument. Any "unjust" benefit that local taxpayers have arguably received is the amount of the claim paid to which the public entity was not entitled. The unjust benefit is thereby fully returned when the federal government is compensated for its losses, which could be achieved through alternative mechanisms. *See* 31 U.S.C. § 3930(D)(5) (2001). In contrast, the FCA's treble damages and penalties are purely punitive – they do not represent any "ill-gotten gains" from which local citizens have benefitted.

Therefore, we urge the Court to grant certiorari in order to clarify that the reasoning in *Newport* requires the application of immunity for local governments from the FCA.

B. The FCA Is Not Applicable to Local Governments Because It Is a Punitive Statute

This Court has already held that States are immune from the FCA and the FCA is a punitive statute. *See Stevens*, 329 U.S. 765. In *Stevens*, this Court holds that States are not "persons" covered under § 3729(a) of the FCA because when it was initially drafted ~~in 1~~863, it did not

define the term "person." *Id.* Given that the original purpose of the FCA was to stop "massive frauds perpetrated by large [private] corporations during the Civil War," the Court determines that the language of the FCA did "less than nothing to overcome" the presumption that States, as sovereigns, are not covered by the term "person." *Id.* at 782-784 (citations omitted).

When Congress amended the FCA in 1986 to impose treble damages and increase civil penalties for violators, Congress again declined to explicitly include state or local governments in the statute's definition of "persons." *See* False Claims Amendment Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986). Further, this Court interprets the 1986 amendment as transforming the FCA into a "punitive" statute. *See Stevens*, 329 U.S. at 784-785. Absent clear congressional intent, the imposition of FCA damages upon States would be inconsistent "in light of the presumption against imposition of punitive damages upon governmental entities." *Id.* at 785 (citing *Newport*, 453 U.S. 247).

This Court's reasoning in *Stevens* regarding the presumption against imposing punitive damages on taxpayers must logically be applied to exempt local governments from liability under the FCA. The Third and Fifth Circuits have interpreted this Court's precedent in precisely this manner. *See United States ex rel. Dunleavy v. County of Delaware*, 2002 U.S. App. LEXIS 1214 (3rd Cir. 2002)[3]; *United States ex rel. Garibaldi v. Orleans Parish*

[3] The Third Circuit explains:

> We find nothing on the face of the relevant portions of the FCA as originally enacted in 1863 or in its current form which evidences a clear indication on the part of Congress to subject local governments to punitive damages under the Act. The Act is utterly devoid of any specific intention to subject local governments to its strictures. This lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA.

Dunleavy, 2002 U.S. App. LEXIS 1214, at *13.

School, 244 F.3d 486 (5th Cir. 2001). Many district courts have agreed. *See United States ex rel. Kinney v. Hennepin County Med. Ctr.*, 2001 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001); *United States ex rel. Honeywell v. San Francisco Housing Auth., et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Cal. Jul. 12, 2001); *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp.2d 1092 (C.D. Cal. 2001); *United States ex rel. King v. Jackson County Hosp. Corp. of Mariana, Fl.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001).[4]

In stark contrast to the many courts that have considered this issue, the Seventh Circuit disregards this Court's precedent in *Stevens* and *Newport*, to arrive at the conclusion that a local public hospital is not immune from the FCA and its punitive damages. Because this decision results in inconsistent burdens upon local taxpayers and members of the public served by local governments, this Court should grant certiorari to clarify this standard.

C. FCA Liability Would Be Particularly Detrimental to Individuals Relying On Local Public Hospitals

Interpreting the FCA's liability provisions to incorporate long-standing local governmental immunity from punitive damages is consistent with public policy, as many courts have already concluded. The public policy arguments are particularly persuasive in the context of local

[4] Other district courts have disagreed, thereby causing a split at the district court level. *See United States ex rel. Rosales v. San Francisco Hsg. Auth.*, 173 F. Supp. 2d 987 (N.D. Cal. 2001); *United States ex. rel. Giles v. Sardie*, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. Jul. 27, 2000); *United States ex rel. R&R Ltd. P'ship v. Mass. Hsg. Fin. Agency*, 154 F. Supp. 2d 19 (D.D.C. 2001).

public hospitals providing health services to underserved populations.

Harm to members of communities served by local public hospitals will be certain and widespread should those hospitals continue to face FCA litigation and punitive damages. Because public hospitals simply do not have disposable resources to pay for such additional costs, FCA. liability will inevitably result in a reduction in services. Local public hospital margins, or the ratio of their revenues to costs, are less than half of that for the industry as a whole. *See America's Safety Net* at 16. In other words, public hospital revenues from patient care services are much lower than private hospital revenues, and are not sufficient to cover high litigation costs or punitive damages awards in FCA cases. In addition, the mere potential for FCA liability and treble damages significantly increases the cost of insurance premiums or may even endanger the ability of the hospital to maintain insurance. When faced with these costs, public hospitals must either turn to local taxpayers for additional funding or free up current funds by reducing services. In either case, the burden of FCA liability will be borne by the innocent – taxpayers or patient populations.

This mission of public hospitals is to provide access to vital health care services to all regardless of ability to pay. Such guaranteed access is particularly important in this time of a nation-wide rise in the number of uninsured. *Id.* at 12. In the face of reduced reimbursement from private and government sources, private providers are less willing or able to serve the uninsured. Public hospitals therefore are assuming an increasingly greater share of this burden. *Id.* This trend is evident in the high percentage of the uninsured among patients discharged by NAPH member institutions.[5]

[5] For example, 39 percent of discharges in 1999 were of the uninsured at the Grady Health System, 47 percent at Jackson Memorial Hospital (Public Health Trust of Miami-Dade County), 32 percent at the

Public hospitals are thus an irreplaceable component of the health care system in this country because they serve those with nowhere else to turn.

Serving the poor and uninsured is not the only crucial role filled by local public hospitals in their communities. NAPH members are also often the primary providers of highly-specialized and extremely expensive services, upon which entire communities rely, such as emergency and trauma care, burn care, pediatric and neonatal intensive care, HIV/AIDS treatment, and psychiatric care. For example, NAPH members represent only 16 percent of all hospital beds, but provide 54 percent of all burn unit beds, 25 percent of all pediatric intensive care unit beds, 26 percent of all psychiatric beds, and 37 percent of all Level I trauma centers. *Id.* at 7-8. These services are not readily available at all hospitals because they are so costly to provide and because they are often severely underreimbursed. In accordance with the public hospital mission, providing such services is a "public good," which is funded in part through local taxpayer support because the market itself does not always ensure adequate access.

Local public hospitals also typically serve as the backbone of community disaster preparedness efforts, which have become particularly important in recent months due to increased concern about threats of biological, chemical or nuclear terrorism. These hospitals are often the only facilities in their community with the capacity to prepare for and respond to mass casualty attacks. *See, e.g.*, Nat'l Ass'n of Pub. Hosp. & Health Sys., *What Are the Basic Components of a Sound Hospital Emergency Preparedness Program?* (2000). Such emergency preparedness requires training, stockpiling supplies and drugs, purchasing specialized equipment and coordinating with local, state and

Health and Hospital Corporation of Marion County and 43 percent at Riverside County Regional Medical Center. *Id.* at 22-23.

national public health officials. Public hospitals also must be ready to respond to other types of public health emergencies, such as natural disasters, urban riots and airplane and train accidents. *Id.* Local communities and indeed the nation as a whole have come to rely on public hospitals to assume these critical responsibilities. Yet these entities do so with very little financial support.

Finally, local public hospitals provide other types of services to an extent not typically provided by private hospitals. These services are critical to enable vulnerable populations to access our health care system. For example, public hospitals provide intensive translation and interpretation services for patients with limited or no English proficiency. NAPH member, Hennepin County Medical Center, for example, meets the needs of its immigrant patients by employing more than 50 interpreters proficient in 20 different languages. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *The Safety Net*, Vol. 15, n.2, 1, 26 (Spring 2002). Other such "enabling services" include child care, social services, transportation and financial counseling. There is typically no direct reimbursement for these essential services.

Given the manner in which they serve their communities, local public hospitals are operating under significant financial constraints. Uncompensated care accounts for 27 percent of total costs for NAPH hospitals as a whole, or approximately $4.7 billion in 1999. In comparison, uncompensated care has remained at six percent for the past 20 years across the entire hospital industry.[6] *America's Safety Net* at 12, 27.

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[6] This is evidenced by the levels of uncompensated care costs borne by *amici*. In 1999 the Grady Health System had total uncompensated care costs of $229 million (over 50 percent of its total costs); Jackson Memorial Health System had over $185 million (25 percent of its total costs); the New York City Health and Hospitals Corporation facilities had over $428 million, the Health and Hospital Corporation of Marion County had $88 million (36 percent of its total costs) and Riverside County Regional Medical Center had $74 million (45 percent of its total costs). *America's Safety Net*. at 26-27.

The foregoing strongly illustrates why punitive damages under the FCA should not be imposed upon local public hospitals. Where the margins of these public hospitals are so low, with minimal, if any, ability to absorb significant new costs, the imposition of punitive damages will jeopardize the health of local communities – possibly on a massive scale. Such a result contradicts this Court's policy considerations articulated in *Newport* and *Stevens,* supporting its conclusion that punitive damages should not be imposed upon municipalities.

Moreover, the imposition of FCA punitive damages is unnecessary to ensure justice. The FCA allows for the use of alternative mechanisms to ensure that local public hospitals comply with federal law. *See* 31 U.S.C. § 3930(D)(5). We therefore urge the Court to grant certiorari in order to apply its sound reasoning in *Newport* and *Stevens* to grant immunity from FCA liability to local governments so that they may continue to provide essential community services.

II. Confusion Caused by a Split in the Circuits Requires Review by this Court

The Court should also grant the petition for certiorari because the confusion caused by the split in the circuits demands review. *See* Sup. Ct. R. 10(a). Many NAPH members, including fellow *amici*, have faced FCA lawsuits. The required defense of these lawsuits is itself an expensive drain on their ability to provide services to their communities. If it is allowed to stand, the Seventh Circuit's decision will only encourage further FCA litigation against local public hospitals. The cost of this litigation, in addition to the potential application of punitive damages, will

provide for windfall recoveries to some relators, while exacerbating the precarious financial straits of safety net hospitals across this nation.

CONCLUSION

For the foregoing reasons, *amici curiae* request this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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